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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK AS STATUTORY INTERVENOR

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QUESTION PRESENTED

The Constitution of New York provides for the election of judges for its trial courts of general jurisdiction. New York's Election Law authorizes the selection of nominees for judicial office by political parties, through conventions whose delegates are directly elected by party members. The question presented is whether this system is facially constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections; Neil W. Kelleher, Douglas Kellner, Helen Moses Donohue, and Evelyn J. Aquila, in their official capacities as Commissioners of the New York State Board of Elections; the New York County Democratic Committee; the New York Republican State Committee; the Associations of New York State Supreme Court Justices in the City and State of New York and Justice David Demarest, individually and as President of the State Association; and Andrew M. Cuomo, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Liliann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

Pursuant to Supreme Court Rule 35(3), all public officers have been substituted for their predecessors automatically.

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OPINIONS BELOW

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JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The New York Constitution, Article VI, Section 6, provides in pertinent part:

> a. The state shall be divided into eleven judicial districts. . . .
>
> b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.
>
> c. The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of the justices of the supreme court shall be fourteen years from and including the first day of January next after their election.
>
> d. The supreme court is continued. It shall consist of the number of justices of the supreme court including the justices designated to the appellate divisions of the supreme court [and certain other judges]. The legislature may increase . . . [or] decrease the number of justices of the supreme court in any judicial district. . . .

4. New York Election Law § 6-106 provides:

> Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

5. New York Election Law § 6-124 provides:

> A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified

> list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate, substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

6. New York Election Law § 6-158 provides in pertinent part:

> 5. A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election.

INTRODUCTION

The Attorney General of the State of New York appears as statutory intervenor to defend the constitutionality of the State's election laws. The State of New York has a sovereign interest in determining the method for selecting its judges. For its trial courts of general jurisdiction — the State's Supreme Court — it has chosen an elective system that, in the State's view, balances the public's interest in an independent, qualified, and diverse judiciary with the interests of the electorate in having some say in the selection process. To meet these goals, the statutory scheme provides for the nomination of party candidates for Supreme Court Justice at conventions of elected delegates, followed by a general election at which other candidates also may appear on the ballot.

In declaring New York's election law unconstitutional and ordering nomination by primary, the lower courts improperly substituted their own choice of a candidate-selection method for that chosen by the State. The Legislature deliberately chose the convention system to advance legitimate goals. The District Court found that New York's delegate-based conventions do not always select the nominee that would be chosen by the voters in a direct primary, that it is difficult for a candidate to compete for the nomination by garnering support among the rank-and-file party members, and that the parties may sometimes choose candidates for petty reasons unrelated to their qualifications. But a delegate-based convention is not designed to produce the same result as a direct primary, and the Constitution does not require it to do so. Moreover, no selection system — whether a direct primary, a delegate-based convention, or any other method — can guarantee that nominees will be selected only on the basis of their qualifications and not on the basis of petty or irrelevant considerations. Because New York's convention system affords all participants the constitutional rights that attach to their designated roles, the judgment of the lower courts should be reversed.

STATEMENT

A. New York's Election Law

1. New York's Current Procedures for Electing Supreme Court Justices

New York, like more than thirty other states that elect some or all of their judges, has opted for elected, rather than appointed, judges for its trial courts of general jurisdiction.[1]

1. New York's governor appoints intermediate appellate court judges from the pool of elected Supreme Court Justices. *See* N.Y.

(Cont'd)

New York's Constitution mandates the election of Supreme Court Justices by judicial district. N.Y. Const. art VI, § 6(a), (c). The State is organized into twelve judicial districts, most of which stretch across multiple counties. *See* N.Y. Const. art VI, § 6(a); N.Y. Judiciary Law § 140. New York's Supreme Court Justices are elected to fourteen-year terms at general elections by voters from throughout the judicial districts in which the Justices serve. N.Y. Const. art. VI, § 6(c). The legislature has provided for the election of a total of 328 Supreme Court Justices, ranging from ten in the Sixth Judicial District (consisting of ten counties in central New York) to fifty-two in the Second Judicial District (consisting of Brooklyn and Staten Island).[2] *See* N.Y. Judiciary Law § 140-a.

New York's Election Law governs the method for electing Supreme Court Justices. When vacancies occur in a judicial district, the statute authorizes each political party to nominate candidates for the general election. New York currently recognizes five political parties: the Democratic Party, the Republican Party, the Conservative Party, the

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(Cont'd)
Const. art VI, § 4(c), (d). The governor also appoints the judges of New York's highest court, the Court of Appeals, from a list provided by a judicial nominating commission, with the advice and consent of the State Senate. *See* N.Y. Const. art. VI, § 2(c)-(f).

For its other trial courts, which are limited in jurisdiction by subject matter and geographic extent, New York law provides for either elected or appointed judges. *See* N.Y. Const. art. VI, §§ 9-17. Where elected, candidates for courts of limited jurisdiction are nominated by direct primary. N.Y. Election Law § 6-110.

2. In addition, judges appointed to the Court of Claims by the Governor or to various local courts by the Mayor of New York City may be, and frequently are, designated administratively to sit as Acting Supreme Court Justices.

Independence Party, and the Working Families Party. *See* N.Y. Election Law § 1-104(3) (defining political "party" as any political organization that polled at least 50,000 votes for its candidate at the last gubernatorial election).

The nominating process has two stages: (1) a party primary at which voters select judicial delegates; and (2) a district-wide convention at which the delegates nominate the party's candidates for judicial office. The first stage takes place in early September, when enrolled party members in each assembly district[3] within the overall judicial district elect delegates and alternates delegates to represent them at the convention. N.Y. Election Law §§ 6-124, 6-160, 8-100. An enrolled party member may have his or another's name placed on the primary ballot by collecting five hundred signatures from enrolled party members within the assembly district (or signatures from five percent of the enrolled members, whichever is less) during the petitioning period each spring. *See* N.Y. Election Law § 6-136(2)(i), (3). The number of delegates and alternates allotted to each assembly district is determined by party rule, but must bear substantial proportionality to the votes cast in that assembly district for the party's candidate for governor at the preceding election to the total number of votes cast state-wide for the party's candidate at that election. N.Y. Election Law § 6-124.

Each party then convenes a judicial nominating convention during the third week of September. N.Y. Election Law §§ 6-126, 6-158(6). The party's delegates (or their

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3. Assembly districts are much smaller geographically than judicial districts. They are the political subdivisions New York uses to elect representatives to the State Assembly, the lower house of the Legislature. N.Y. Const. art III, §§ 4, 5. There are 150 assembly districts in New York. N.Y. State Law § 121. Each judicial district encompasses between nine and twenty-four assembly districts. 2d Cir. J.A. 1536.

alternates) from each assembly district attend the convention for the sole purpose of nominating the party's candidates to fill Supreme Court vacancies throughout the judicial district. N.Y. Election Law § 6-106. Depending on the election year and the district, the delegates may nominate as few as one or as many as a dozen judicial candidates at one convention.

In November, the State holds its general election at which voters across the judicial district cast their votes for candidates for the vacant Supreme Court positions. N.Y. Election Law § 8-100(1)(c). The parties' certified nominees automatically appear on the general election ballot. N.Y. Election Law §§ 6-156, 7-104(5), and 7-116. The Election Law provides two alternative means of access to the general election ballot. First, any independent body[4] or individual can have a qualified judicial candidate's name placed on the ballot by gathering 3,500 signatures (4,000 in New York City), or signatures from five percent of the number of votes cast for governor in the prior election, whichever is less. N.Y. Election Law §§ 6-138, 6-142(2). Individuals may also have votes cast on their behalf by write-in ballot. N.Y. Election Law §§ 7-104(7), 7-108(8). Registered voters within the judicial district have the opportunity to cast votes for as many candidates as there are vacancies for the office of Supreme Court Justice within their district. *See* N.Y. Election Law § 7-104(4)(c).

2. The History of Nominating Conventions in New York

New York's current system for judicial nominations is no accident. Rather, it is a deliberate response to the perceived advantages and disadvantages of the alternatives the State has tried.

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4. New York defines "independent body" as any organization or group of voters that nominates candidates for elective office but is not a political "party." N.Y. Election Law § 1-104(12).

Before 1846, New York's governor appointed the State's judicial officers. N.Y. Const. of 1821, art. IV, § 7. Riding the wave of Jacksonian populism, in 1846, New York amended its Constitution to become only the second state to provide for the popular election of its judges. N.Y. Const. of 1846, art. VI, § 12. At first, the political parties nominated their candidates for Supreme Court Justice, as they did for other elective offices, at party caucuses or "primary meetings" attended by both party activists and rank-and-file members. Near the turn of the twentieth century, the Legislature took note of the abuses that frequently occurred at these contentious affairs, and launched a series of investigations into alternative nominating methods. *See, e.g.*, N.Y. State Assembly, *Report of the Select Committee on the Subject of Primary Elections in the State of New York*, Assemb. Doc. No. 96, at 1-5 (1882). Some argued in favor of direct party primaries, while others advocated for nomination by delegates at party conventions. *See* N.Y. State Senate, *Report of the Joint Committee of the Senate and Assembly of the State of New York, Appointed to Investigate Primary and Election Laws of This and Other States*, S. Doc. No. 26 (1910) (containing extensive testimony and other evidence about the relative merits and demerits of each nominating system).

In 1911, the New York Legislature — joining a growing trend nationally — mandated direct primaries for nominating candidates for Supreme Court Justices as well as for certain other state-wide offices. Act of Oct. 18, 1911, ch. 891, 1911 N.Y. Laws 2657. Before long, however, abuses in the direct primary system surfaced. A 1917 New York Times editorial condemned the direct primary as "device capable of astute and successful secret manipulation by professionals." Editorial, N.Y. Times, May 1, 1917, at 12. The Republican candidate for governor in 1920 campaigned against direct primaries, decrying them as "a delusion and a snare, a fraud" that "offered the opportunity for two things, for the

demagogue and the man with money, and I am in favor of restoring, as far as the election of State and judicial candidates is concerned, a representative party system." *Miller Declares Primary a Fraud, Promises If Elected to Try to End It in State and Judicial Nominations*, N.Y. Times, Oct. 23, 1920, at 4.

There soon were numerous legislative proposals that called for replacing direct primaries with nominating conventions where representative delegates would choose the parties' nominees. Legislative sponsors of these bills described the experiment with direct primaries as an "abject failure." *See Urge Modification of Primary Law*, N.Y. Times, Mar. 3, 1919, at 5. The sponsors observed that only a small portion of the electorate took note of direct primaries, and those who did seldom knew anything about the candidates they voted for. *Id.* As a result, the sponsors argued, only men of great wealth or backing by party leaders could be nominated. *Id.* The Committees of the New York State and City Bar Associations and numerous other organizations joined the drumbeat to abolish direct primaries for judicial candidates. *See Albany Bills Approved*, N.Y. Times, Mar. 18, 1918, at 19; *New York Bar Finds Bad Bills in Albany*, N.Y. Times, Feb. 21, 1919, at 8.

In 1921, the New York Legislature, agreeing that its brief experiment with direct primary elections should be abandoned, enacted legislation to replace it with a representative convention system. Act of May 2, 1921, ch. 479, 1921 N.Y. Laws 1451. The 1921 law provided for state-wide conventions to nominate certain state officers and judicial-district-wide conventions to nominate Supreme Court Justices, with delegates to these conventions chosen by a majority vote in each assembly district.

The special committee of the State Senate proposing the 1921 legislation described the nominating convention as an "assemblage of each political party in the State, that each may make manifest, after consultation and deliberation, what its aims are." N.Y. State Senate, *Report of the Special Committee of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34, at 2 (1918). After giving "careful consideration to the question of state primaries" and the attendant costs of mounting elections, the special committee found it "essential" to reestablish state-wide conventions and conventions for the nomination of Justices of the Supreme Court. *Id.* at 3. The committee noted that conventions are particularly appropriate for nominating judicial candidates, where "[it] is inherent in the functions of the judicial office that the office should seek the man, and not the man the office." *Id.*

Since 1921, the issues of whether to nominate judicial candidates by convention or direct primary and whether to have an elected judiciary at all have been vigorously debated in New York. *See, e.g.*, 9 N.Y. State Constitutional Convention Committee Report, *Problems Relating to Judicial Administration and Organization* 997-1002 (1938). At New York's 1967 Constitutional Convention, delegates again rejected efforts to replace conventions with direct primaries for nominating candidates to the Supreme Court bench. *See Minority Report of Committee on the Judiciary* 3 (1967), *in* 11 *Proceedings of the New York State Constitutional Convention of 1967*, Doc. No. 50-A. Most recently, the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission") issued a report at the behest of New York's Chief Judge concluding that the convention system is preferable to candidate selection by direct primary, largely because primaries pose "a great risk of attracting substantial increases in partisan spending on

New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* 3 (Feb. 6, 2006) ("Feerick Commission Report"), *available at* http://law.fordham.edu/commission/judicialelections/images/jud-finreport.pdf. Thus far, the State has chosen to retain the judicial nominating system that the New York Legislature enacted in 1921.

B. Proceedings Below

Plaintiffs — individual voters and aspiring judicial candidates — commenced this action in March 2004 against the New York State Board of Elections and its members, challenging as unconstitutional the method by which New York State's Supreme Court Justices are selected. Specifically, plaintiffs asserted that New York's "closed judicial convention system denies voters their right to choose among their parties' candidates . . . by placing severe and unjustified burdens on candidates seeking to challenge candidates who are backed by local Democratic or Republican Party leaders." 2d Cir. J.A. 1, 2. They sought a declaration that New York's current statutory system violates the First and Fourteenth Amendments of the United States Constitution, both "facially and as applied." 2d Cir. J.A. 35. Additionally, plaintiffs asked the court for an injunction imposing a direct primary system in which candidates would petition for primary ballot access by obtaining a set number of signatures, unless the State's Legislature were to amend its laws within ninety days to reform the convention system. 2d Cir. J.A. 35.

After the State Board of Elections answered, 2d Cir. J.A. 41-44, plaintiffs moved for a preliminary injunction seeking to enjoin the Board from enforcing three provisions

of the State's election law governing the parties' nomination of candidates for Supreme Court Justice: § 6-106, which provides that party nominations for the office of Supreme Court Justice shall be made by judicial convention; § 6-124, which provides for delegate selection by primary; and § 6-158, which provides for judicial conventions to be held in the third week of September preceding the general election.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the Election Law provisions. *See* 28 U.S.C. § 2403(b). Additionally, the New York County Democratic Committee, the New York State Republican Committee, the Association of Justices of the Supreme Court of the State of New York, the Association of Justices of the Supreme Court of the City of New York, and Justice David Demarest, individually and as President of the State Association, intervened as defendants.

From September through November 2004, the District Court held an evidentiary hearing on the motion for a preliminary injunction. The hearing spanned thirteen days, during which the court heard testimony from fourteen witnesses and received thousands of pages of documentary evidence. This evidence focused on how the nomination process actually worked in New York's First and Second Judicial Districts — located in New York City — over the past several decades, although there was also some evidence regarding party nominations in the upstate judicial districts.

On January 27, 2006, the District Court issued a preliminary injunction against the challenged provisions of the Election Law, concluding that plaintiffs were likely to succeed on the merits of their claim that New York's judicial convention system violates the First Amendment. Pet. App. 95. Borrowing from the test applicable to challenges by candidates to obstacles to the general election ballot

established in *Storer v. Brown*, 415 U.S. 724, 742 (1974), the District Court asked the following questions: Could a reasonably diligent challenger candidate for Supreme Court Justice succeed in getting her own delegates on the ballot for each assembly district? And if not, could she succeed in lobbying the elected delegates? Pet. App. 167. The District Court answered the first question in the negative, finding that as a practical matter, a judicial candidate cannot obtain enough signatures in enough assembly districts to run a slate of delegates pledged to that candidate. Pet. App. 167. Moreover, the court concluded that at the convention, the delegates do not independently evaluate candidates for Supreme Court Justice but instead follow the wishes of their party leaders. Pet. App. 169. Thus, the District Court held, the burdens on the judicial candidates' access to the nomination process are "severe." Pet. App. 172. Applying strict scrutiny, the District Court found that the statutory scheme is not narrowly tailored to achieve any compelling state interests. Pet. App. 172-183.

Although it purported to order only interim relief, the District Court imposed a sweeping permanent remedy that enjoined operation of the State's laws providing for delegate selection and judicial conventions. The court ordered that the convention system be replaced by direct primary elections until the New York Legislature enacts a new method for selecting Supreme Court Justices. Pet. App. 183-185.

The United States Court of Appeals for the Second Circuit affirmed. Pet. App. 6. The Court of Appeals agreed with the District Court that aspiring candidates have a constitutional right of access to nomination by their political party, and that voters have a corresponding right to vote for the candidate of their choice. Pet. App. 37-44. Notwithstanding the meaningful access candidates may have to the general election ballot, Pet. App. 54-57, the court held

that the State's provisions severely limit reasonably diligent candidates' access to nomination by their own party and are therefore subject to strict scrutiny. *Id.* at 57-70.

The Court of Appeals rejected the State's rationales for choosing the representative convention system over direct primaries. While agreeing that the State has a compelling interest in protecting the parties' right to select and advocate on behalf of their preferred candidates, the court held that the State's scheme is not narrowly tailored to achieve that end. Pet. App. 71-72. The court also held that the convention system was not narrowly tailored to promote geographic and racial diversity or judicial independence, concluding that less burdensome means exist to serve this end. Pet. App. 73-76. Finally, the Court of Appeals held that the District Court had acted within its discretion in ordering the substitution of a direct primary for the convention-based nominating system. Pet. App. 79-84.

SUMMARY OF ARGUMENT

1. New York's statutory election scheme, under which parties nominate their candidates for the office of Supreme Court Justice by elected delegates at district-wide conventions, is facially valid. Delegate-based conventions as an alternative to direct primaries are firmly rooted in this Nation's history and remain in use in many places today. Conventions allow voters who may not be fully informed about candidates' qualifications to rely on a small set of delegates who can educate themselves and coordinate their efforts to nominate the best slate of candidates. Because of their long pedigree and unquestioned legitimacy, delegate-based conventions are constitutionally acceptable.

Nothing about New York's convention system in particular raises constitutional questions. The State does not

categorically exclude anyone from the nomination process, and it makes it easy for any interested voter to run as a delegate or to vote for any candidate in the general election. That is all this Court's precedent demands. The features the lower courts found troubling — such as that candidates who lack the support of party leaders may not capture the nomination even though they enjoy support among rank-and-file members — simply reflect that this is a convention system, not a direct primary. It is neither surprising nor problematic that the results of a convention may differ from those of a primary. That is precisely why States choose to have conventions in the first place. And if party leaders abuse their power to nominate candidates, rank-and-file members may either abandon the parties' nominees in the general election or replace the party leadership.

To be sure, there may be policy-based arguments for changing aspects of the convention system or even replacing it with direct primaries. But these are not constitutional arguments, and so the choice ought to be left to the State Legislature.

2. Even if the current system were constitutionally infirm, the remedy imposed by the lower courts would be improper. The courts should have left the choice of remedy to the State Legislature in the first instance. And if an immediate judicial remedy were needed, the courts should have crafted a more narrowly tailored injunction — one that preserved the State's reliance on delegate-based conventions but redressed the particular constitutional problems identified by the courts.

ARGUMENT

I. New York's Statutory Scheme For Nominating Judicial Candidates Is Facially Constitutional Because It Accords All Participants The Constitutional Rights That Attach To Their Roles

Although nothing in the Constitution requires a State to provide for the popular election of its judges, *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002), New York has decided to use elections to select certain of its judges — namely, the Justices of the Supreme Court, which is the trial court of general jurisdiction. Having chosen to "tap the energy and legitimizing power of the democratic process," the State "must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* at 788 (quotation marks omitted).

But the State retains considerable discretion to shape its electoral process to suit its legitimate interests. "The Constitution grants States 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by the state control over the election process for state offices.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, the States have legitimately developed "comprehensive, and in many respects complex, election codes" that regulate, among other things, "the selection and qualification of candidates." *Id.*

A. Delegate-Based Conventions Are a Legitimate Method For Nominating Candidates.

1. Conventions are deeply rooted in the Nation's history.

This Court has already acknowledged that "[i]t is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added). The observation that a State may mandate nominating conventions is not surprising, because conventions have a long and prominent history in this country.

Conventions — and their precursors, caucuses — were held even before the constitutional convention in 1787. In early America, self-appointed members of political organizations would hold caucuses to nominate candidates for local office. *See* Hugh A. Bone, *American Politics and the Party System* 261 (1971); Theodore W. Cousens, *Politics and Political Organizations in America* 340-43 (1942); V.O. Key, *Politics, Parties and Pressure Groups* 400-04 (1952).

According to historian Robert J. Dinkin:

> While small groups of gentleman met to set up candidates in many rural communities, residents of some of the rapidly growing towns and cities began establishing a larger and more formalized nominating body, which was increasingly referred to as a caucus. By the eighteenth century, conflicting interests had begun to emerge in many

> urban areas. As these divisions occurred, it became apparent that the existing government could no longer satisfy all segments of the community. Soon, men holding a particular set of beliefs and values felt it necessary to organize for the purpose of selecting individuals who would best promote the interests of their own group.

Robert J. Dinkin, *Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689-1776*, at 75-76 (1977). During the Revolutionary War and the Nation's earliest years, the Federalists, anti-Federalists, and other factions used caucuses in one form or another to nominate their candidates for public office. *See* Robert J. Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789*, at 57-72 (1982).

But caucuses proved ill-suited for choosing candidates in growing urban population centers and, given the transportation and communication limitations of the time, for state-wide or national office. As a result, the nominating convention took root as the preferred method for selecting candidates for certain offices. Bone, *supra*, at 261-63; Key, *supra*, at 404-08. The theory was that well-informed representatives would convene to debate, compromise, and ultimately nominate candidates, and to determine the organization's positions on issues:

> In theory at least, the convention possessed outstanding merit. The stairway of conventions from the local to the state and eventually to the national level provided a hierarchy of deliberative bodies to consider candidates and issues. Here divisive interests within the counties and state could be compromised and ironed out. The

> convention offered a vehicle to reduce extreme factionalism and to promote unity. Nominations would more likely include able but not widely known men who remained in political oblivion under the caucus system. The delegate convention appeared to offer an excellent example of representative democracy.

Bone, *supra*, at 262.

The notion of a representative convention was, of course, the paradigm for the Constitutional Convention in 1787. And it is the one the framers of the Constitution chose for electing the President and Vice President of the United States — the Electoral College. *See* U.S. Const. art. II, § 1. The framers perceived no constitutional infirmity in having the States use methods other than the popular vote to choose their electors, who were not bound to vote for any particular candidate, to represent them in the Electoral College:

> The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson v. Blacker, 146 U.S. 1, 27 (1892); *see also id.* at 36 (upholding the constitutionality of the method for choosing electors even if it resulted in electors who did not "exercise a reasonable independence and fair judgment" in Electoral College proceedings).

As the Nation's political parties took hold in the early decades of the nineteenth century, they too turned to nominating conventions to select their candidates for public office. In 1804, Republicans in both New Jersey and Delaware held the first state-wide nominating conventions, where delegates elected by party voters nominated the parties' candidates. Cousens, *supra*, at 343. In 1824, Republican leaders called on the other mid-Atlantic states to use state-wide conventions to choose the party's candidates for governor, and the state convention in its pure form became permanently established in New York, Pennsylvania, and Rhode Island. *Id.* By the end of the decade, the party nominating conventions for state-wide office became widespread. Bone, *supra*, at 262-263.

Before long, the Nation's political parties also began using nominating conventions to choose their candidates for national office. The first national convention of a political party was held in 1830, when ninety-six Anti-Masonic Party delegates from ten states met in Philadelphia. Cousens, *supra*, at 345. Then in 1832, President Andrew Jackson, campaigning vigorously against the prevailing legislative caucus method for choosing such candidates, turned to the national convention to help nominate his choice for Vice President. *Id.* at 346; Bone, *supra*, at 287. During the next few elections, the Whigs and Democrats used the national convention to ratify, if not choose, their candidate for President, and to try to agree on their choice for Vice President. By mid-century, national conventions had "reached their full stature." Bone, *supra*, at 287; Cousens, *supra*, at 347. The parties' use of national conventions as the dominant means of nominating their presidential candidates continued for more than one hundred years. Leon D. Epstein, *Political Parties in the American Mold* 88-108 (1986).

Perhaps the most well-known example of nomination by convention, and one that illustrates its best features, is the Republican Party's use of that method to propel Abraham Lincoln to the presidency in 1860. First in county conventions, and then at the state convention, Republican Party leaders in Illinois sifted through a wide range of contenders before settling on the relatively unknown candidate from their own state. Again through negotiations at the national convention, the national party settled on Lincoln as its compromise candidate after William Seward and Salmon Chase proved too divisive. *See* William Baringer, *Lincoln's Rise to Power* 188-295 (1937); Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 237-256 (2005).

Throughout the twentieth century, the major parties continued to use national conventions to nominate their candidates for President. As of 1971, the state party committees used three methods to select delegates — selection by party committee, selection at a party convention, and party primaries — and more delegates were chosen by party convention than party primaries. Bone, *supra*, at 289-90; *see also* Epstein, *supra*, at 97. The delegates were generally not bound to any particular candidate and were permitted to take part in the give-and-take inherent in the convention. *Id.* During the 2000 presidential elections, a substantial number of States — including Alaska, Delaware, Hawaii, Iowa, Minnesota, Nevada, South Carolina, Utah, Vermont, and Wyoming — authorized parties to select delegates to the national nominating convention according to party rules, and to nominate their presidential and vice presidential candidates at a state-wide caucus or convention without regard to primaries. *See Nomination and Election of the President and Vice President of the United States, 2000*, S. Doc. No. 106-16, at 233-307 (2000). And in some States where presidential preference primaries were held — including Alabama, Illinois, Maryland, Montana, and West Virginia — the results of those primaries did not bind the parties' delegates at the national convention. *See id.*

Although mandatory direct primary laws became increasingly prevalent through the twentieth century, the direct primary continues to be only one of an array of candidate-selection methods authorized by the States. Many States still authorize or require parties to use either conventions or caucuses to nominate candidates for some of the States' elective offices.[5] For example, in both Indiana and South Dakota, political parties use state-wide conventions to nominate their candidates for a wide range of offices — lieutenant governor, secretary of state, attorney general, state auditor, treasurer, and superintendent of public education. Ind. Code §§ 3-8-4-2; S.D. Codified Laws § 12-5-21. Similarly, in Michigan, the parties use state-wide conventions to nominate candidates for lieutenant governor, secretary of state, attorney general, and members of the state board of education. Mich. Const. art. 5, § 21; *id.* art 8, § 3; Mich. Comp. Laws §§ 168.72-.74; *see also* Iowa Code § 43.123 (parties choose lieutenant governor at state-wide conventions).

Virginia and some other southern states give the major political parties the option to use the convention or primary method to nominate candidates for United States Senate and state-wide office, as well as for a variety of county and local offices. Va. Code §§ 24.2-508, 24.2-509; S.C. Code §§ 7-11-10, 7-11-30.[6] Moreover, some States still permit parties to use

5. For a comprehensive, though already outdated, treatment of the States' election laws pertaining to candidate nomination, see Alexander J. Bott, *Handbook of United States Election Laws and Practices* 96-138, 172-175 (1990).

6. In many — if not in most — States, minor or new parties are authorized or required to nominate their candidates at conventions. *E.g.*, Del. Code tit. 15, §§ 3101A, 3301; Ga. Code §§ 21-2-170, 21-2-172, 21-2-180; Iowa Code § 44.1; Kan. Stat. §§ 25-301, 25-302; Ky. Rev. Stat. § 118.325; N.M. Stat. § 1-8.2; N.C. Gen. Stat. §§ 163-96, 163-98; Or. Rev. Stat. §§ 249.732 -.737; Tex. Elec. Code §§ 172.001-.002; 181.001-.005; Wash. Rev. Code § 29A.20.121; W. Va. Code § 3-5-22; Wyo. Stat. § 22-4-303.

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the caucus method to nominate candidates for certain local offices. *E.g.*, Maine Rev. Stat. tit. 30A, §§ 2525, 2528(4); N.H. Rev. Stat. §§ 669:17; 669:37-:53; Wis. Stat. § 8.05. New York, for example, permits its political parties to use caucuses to nominate their candidates for town offices in some counties. N.Y. Election Law §§ 1-104(28), 6-108.

In view of this history, conventions cannot be thought constitutionally suspect. *Cf. Storer*, 415 U.S. at 730 ("It is very unlikely that . . . a large portion of the state election laws would fail to pass muster under our cases . . . ."). Although conventions prevent voters from choosing their parties' nominees directly, representative democracy — which is, after all, embodied in the Constitution itself — is a legitimate political structure.

2. Conventions serve legitimate state interests.

States choose delegate-based conventions because they temper some of the characteristics of direct elections that might be thought undesirable, particularly for judicial offices. Direct elections work best when the electorate is fully informed about the qualifications of the candidates. That is most likely to occur in campaigns for prominent offices, such as President or Governor, because those campaigns are likely to attract heavy media coverage. For less visible offices — and particularly for offices that demand specialized qualifications, such as judicial positions — the general electorate is not always as informed. As this Court has observed:

(Cont'd)

In a variation on the theme, some states — including New York — provide for pre-primary conventions at which political party leaders can designate or endorse their preferred candidates before the primary elections are held. *E.g.*, N.Y. Election Law § 6-104; Conn. Gen. Stat. §§ 9-382 to -390; N.D. Cent. Code §§ 16.1-11-06 to -11.

> Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions.

Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

This drawback might be thought to be more severe in primaries than in general elections. In the general election, the party itself it can work to educate voters about its nominees' relative qualifications compared to their opponents'. In the primary, however, the party has not yet settled on its standard-bearers. The candidates must raise money themselves and develop their own campaign strategies to spread their messages. Primaries thus may further politicize the selection process for offices. This result may be especially undesirable for judicial offices, because it may jeopardize the candidates' actual and perceived independence.

Direct primary elections also make it difficult for a party to nominate a coordinated slate of candidates when it is filling more than one vacancy at once, as is often the case with Supreme Court Justices. A party might think it desirable, for example, to present a geographically diverse slate for the general election, so as to attract votes from across the district. Because there are so many voters in a primary, it is virtually impossible for the voters to work together to assemble a balanced slate.

Delegate-based conventions offer an alternative that mitigates these concerns. Rather than choosing the nominees directly, the rank-and-file party members elect representatives to make the choice for them. These delegates are often party

activists who are familiar with the values of the party membership as a whole and who can educate themselves about the qualifications of the candidates and the duties of specialized offices. And because there are relatively few delegates elected, they can coordinate their efforts with each other. That allows them, if they choose, to settle on a balanced slate of nominees exhibiting geographic or other diversity.

New York's experiences illustrate the advantages that conventions may offer over direct primaries. After New York's experiment with the primary system nearly a century ago, the State Legislature, the press, and leading bar associations decried the primary system as a failure that jeopardized the independence of the judiciary. It was observed that because candidates needed to raise large sums of money for the primary, only the wealthy and demagogues could get elected. Because voters had little knowledge about the candidates, they often voted solely on name recognition. These concerns precipitated the quick return to the convention system.

As the Feerick Commission reported to New York's Chief Judge last year, these concerns are no less apt today. The Feerick Commission's study found major increases in campaign spending in judicial contests in which nominees are chosen by primaries, with campaign expenditures skyrocketing in judicial primaries around the nation in the last decade. In its view, "there is every reason to assume the same dynamic would take hold in New York State Supreme Court races." Feerick Commission Report, *supra*, at 15-16.

The Feerick Commission also found that "the convention system has delivered geographic diversity to the Supreme Court bench, an attribute of no small moment in the state's sprawling judicial districts covering many counties." *Id.* at 15. Candidates from rural counties located in the same

judicial district as urban counties have been able to succeed under the convention system where the delegates can trade votes among multiple candidates for multiple vacancies. Simple arithmetic aggregation of primary votes would be less likely to lead to that diversity.

To be sure, conventions have drawbacks as well. By design, conventions concentrate the nominating power in fewer hands, which might present an opportunity for someone to abuse that power. Some policymakers might conclude that this possibility outweighs whatever other benefits might flow from the convention system; others might conclude that the benefits of the system outweigh the potential for abuse. There are tradeoffs involved in every system for selecting judges. Determining the appropriate balance is a matter for legitimate policy debate in the States. The Constitution, however, does not resolve this debate. It allows the States to choose delegate-based conventions in place of direct conventions, especially for judicial offices.

B. New York's Judicial Convention System Meets the Requirements of This Court's Election Jurisprudence.

1. New York neither categorically excludes candidates nor imposes arbitrary obstacles to the ballot when it holds an election.

When the nominating phase is an integral part of the selection process, this Court's precedents establish two principles. First, participants in the nomination process may not be categorically excluded based on unconstitutional criteria, such as race. For example, this Court has struck down party rules that excluded blacks from voting in the party primary. *Smith v. Allwright*, 321 U.S. 649 (1944).

Second, when an election is held, the State may not impose severe barriers to candidates' access to the ballot absent a compelling interest. For example, this Court has struck down the requirement that candidates pay an unreasonably high filing fee to be listed on a primary ballot. *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *cf. Storer*, 415 U.S. at 738 (remanding for consideration of whether state law imposed "excessively burdensome requirements upon independent candidates" for access to the ballot in the general election). On the other hand, this Court has upheld a ban on write-in candidates on primary ballots. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). Thus, not all barriers are subject to heightened scrutiny. "Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects — at least to some degree — the individual's right to vote and his right to associate with others for political ends.'" *Burdick*, 504 U.S. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). But "'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman v. Beaver*, 544 U.S. at 587 (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

New York's election laws comport with these principles. The State does not categorically exclude anyone from participating in the nomination process based on race or other protected characteristics. And with respect to nominations for Supreme Court Justices, the only election that is held is the primary for delegates to the judicial convention. The barriers to ballot access for this primary are quite low. A candidate needs at most 500 signatures for a place on the primary ballot. *See* N.Y. Election Law § 6-136(2)(i), (3). Even when a candidate is running unopposed, voters will have an opportunity to cast write-in votes if they file a petition with 500 signatures requesting the right to do so. *See id.* § 6-164.

These requirements are considerably less onerous than other measures this Court has upheld. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a requirement that nominating petitions contain signatures from five percent of registered voters); *Burdick*, 504 U.S. at 441 (upholding a ban on write-in candidates on primary ballots).

And even if the ballot-access principles carry over to the voting at the convention itself, New York's laws easily satisfy them. There are no statutory barriers to a judicial candidate's being considered by the delegates at the convention; there is not even a written ballot. Candidates need not, for example, file petitions with the signatures of five percent of delegates before their name can be submitted to a vote of the convention. Under the statute, delegates are free to vote however they like, regardless of how the other delegates are voting. Because there are literally no barriers to ballot access at the convention, there can be no constitutional issue relating to the convention ballot.

2. The features identified as problematic by the lower courts merely distinguish conventions from primaries.

In invalidating New York's convention system, the lower courts were troubled that some candidates might not have a "realistic opportunity" to participate in the nomination process because the delegates would not give them meaningful consideration as potential nominees. Pet. App. 41, 163. But the features that make this true do not involve any constitutional defect. Rather, they are typical of delegate-based conventions. If these features render the convention system unconstitutional, then virtually any convention system that did not merely reflect popular sentiment would fail as well.

First, the courts concluded that a so-called challenger candidate — one who enjoyed support from rank-and-file party members but not the party leadership — would be unlikely to win the party's nomination. In other words, a convention may settle on a nominee who is different from the nominee that would emerge if a direct primary were held. But the whole point of conventions is to insulate (to some degree) the choice of nominee from the rank-and-file voters. If conventions were constitutionally permissible only if their outcomes mirrored those that would result from direct elections, they would serve no purpose. The Constitution does not require nominations to reflect the unmediated choice of the party membership as a whole. As this Court observed in *White*, it is "too plain for argument" that the State may require that party nominations be settled "by convention." 415 U.S. at 781. And in a convention system, the candidate needs support from the delegates, not the rank-and-file members.

Second, the lower courts were troubled that in practice, it seems that the convention delegates merely ratify choices made by the party leadership. In other words, the party leaders seem to exercise control over the delegates by enforcing party discipline. But whatever the merits of strong party discipline as a matter of policy, it is not a constitutional problem. It is unremarkable that a party — which, presumably, is composed largely of like-minded individuals who share core values — would try to proceed by consensus whenever possible. And it is legitimate for the delegates to defer to the judgment of party leaders — who, one would expect, have become leaders precisely because they understand what the rank-and-file members want.

This is not a phenomenon unique to nominating conventions. Congress, for example, routinely acts on party-line votes. Nobody suggests that citizens are deprived of their right to representation merely because their congresspersons

often follow marching orders set by the majority and minority leaders. So too with conventions. Voters who object to strong party discipline are free to vote for delegates who pledge their independence, just as voters are free to vote for congresspersons who buck the party leadership.

Third, the delegates have no constitutional obligation to give meaningful consideration to all candidates who seek their support. This Court has vigorously affirmed the special protections accorded by the First Amendment to the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Jones*, 530 U.S. at 575 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). "The moment of choosing the party's nominee . . . is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Id.* (quoting *Tashjian*, 479 U.S. at 216); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1999) (the "party, and not someone else, has the right to select [its own] standard bearer"). Just as a State cannot dictate who may sit as delegates to a party's convention, *see Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 126 (1981); *Cousins v. Wigoda* 419 U.S. 477 (1975), it cannot tell the delegates seated at the convention that they must give meaningful consideration to every qualified individual seeking to become the party's candidate.

Moreover, this Court observed in *Jones* that some political parties are "virtually inseparable from their nominees," giving as examples Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, and the Henry Wallace Progressives of 1948. 530 U.S. at 575. Candidate-centered parties are antithetical to the notion that political parties must give meaningful consideration to all qualified candidates and may not simply ratify the choice of party leaders.

Finally, it is irrelevant that — as the lower courts concluded — it would be virtually impossible for a challenger candidate to run a slate of delegates pledged to him or her in every single district, with the goal of amassing enough support at the convention to force his or her nomination. Delegates — who, after all, often must choose several nominees, not just one — do not run on a platform supporting a particular judicial nominee. The judicial conventions thus are not merely an inexact proxy for direct democracy, as (for example) the Electoral College has largely become for presidential elections. *See McPherson*, 146 U.S. at 36 ("Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that . . . they were so chosen simply to register the will of the appointing power in respect of a particular candidate."). The system is not designed around the idea of pledged candidates, and nothing in the Constitution requires such a system.

3. The electoral process as a whole offers significant checks on persistent abuses of power by party leaders.

If delegates or party leaders pick nominees that rank-and-file voters do not want, those voters have several options. First, they need not vote for the nominee in the general election. Voters are free to cast their ballots for other listed candidates or for write-ins. Independent candidates need gather no more than 4,000 signatures to appear on the ballot. N.Y. Election Law § 6-142(2).

Second, if the leadership consistently thwarts the rank-and-file members' preferences, the members can select new leaders. Party leaders are chosen either directly or indirectly by the membership. *See* N.Y. Election Law § 2-106 (members of the state and county committees are elected through

primaries); *id.* § 2-112 (committe chairs and other officers are selected by the committee members); *id.* § 2-120 (other party positions are filled through primary elections). Those in positions of leadership retain their power only so long as on the whole they satisfy the rank-and-file members.

Third, disaffected voters can leave the party entirely. This option is especially viable in New York, which has five major parties, giving voters a broader choice beyond Democrats and Republicans. Even in areas of effectively single-party rule, that party is unlikely to remain dominant if it alienates a large segment of the population by nominating consistently unpopular candidates for public office.

The District Court found that these democratic checks have not prevented party leaders from promoting candidates who would not win a direct primary, blocking candidates with rank-and-file support, or making decisions based on reasons unrelated to the candidates' qualifications. But the fact that the system may not guarantee that nominees will be selected based only on their popular support or objective qualifications does not suggest a constitutional defect in the statute on its face. If the political parties are misbehaving, it is up to their members — not the courts — to discipline them.

II. In Any Event, The Lower Courts Erred In Completely Dispensing With The State's Choice Of A Convention System And Imposing A Direct Primary Instead

By enjoining judicial nominating conventions and imposing a primary system — even temporarily — the lower courts made a choice that is properly reserved to the Legislature. That choice was neither necessary nor proper. Even if this Court concludes that the challenged provisions are unconstitutional — which, for the reasons explained above, it should not — it should vacate the preliminary

injunction imposed below and remand for the courts to craft a more narrowly tailored remedy.

Federal courts must be cautious not to blur the separate duties of the judicial and legislative branches of government, particularly when fashioning a remedy to redress a constitutional flaw in a statute. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (courts must be "mindful that [their] constitutional mandate and institutional competence are limited"); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.").

That is particularly true where the case touches on core sovereign interests, as with election matters. For example, in *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964), a three-judge panel concluded that Alabama's apportionment scheme was unconstitutional but declined either to stay an impending primary election that was subject to the scheme or to impose its own plan immediately. *Id.* Instead, the court gave the Alabama Legislature an opportunity to design a reapportionment plan that comported with the court's preliminary findings. *Id.* It was only when the Legislature failed to act that the District Court imposed its own plan. *Id.* at 586. Viewing the remedy to be "an appropriate and well-considered exercise of judicial power," this Court remarked that the District Court "correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.*

The manner in which state elections are held is likewise "primarily a matter for legislative consideration and determination." *Id.* Thus, where a court concludes that an election law is unconstitutional, it should give the Legislature an adequate opportunity to remedy the problem. *See Lewis v. Casey*, 518 U.S. 343, 362, 363 n.8 (1996) (finding that the injunction imposed by the District Court was "inordinately – indeed, wildly – intrusive" where court did not give the States the first opportunity to correct the errors made in the internal administration of their prisons); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (In discharging their duty to protect constitutional rights, "courts cannot assume that state legislatures . . . are insensitive to the requirements of the Constitution."). By imposing a remedy without first giving the New York Legislature an opportunity to respond to the findings in this case, the lower courts erred.

Even if immediate relief were required, the court must "limit the solution to the problem" and "try not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 328-29. It must restrain itself from "rewriting state law" to conform to its view of how best to comply with constitutional requirements. *Id.* at 329 (brackets omitted).

New York's Legislature has long favored the use of the representative convention system over direct primaries to nominate its Supreme Court Justices. The lower courts usurped that legislative judgment when they rejected the convention system for direct primaries because they view the latter as the better system. The scope of the remedy they imposed was anything but narrow. The courts invalidated the statutory provisions requiring judicial nominating conventions in their entirety. They did not tailor the remedy to the specific defects they found in the convention system or to enjoining particular behavior by the parties that created the constitutional problems. Instead, they decided for the

State which of many alternatives should be implemented in lieu of conventions, and imposed that remedy across the board and indefinitely.

It is no answer that New York uses direct primaries for nominating candidates for most of its other elective offices. The Court of Appeals misread New York Election Law § 6-110 when it concluded that the direct primary system is the State's "default" system for nominating candidates for public office. Pet. App. 83. Section 6-110 provides, "All other party nominations of candidates for offices to be filled at a general election, except as provided herein, shall be made at the primary election." Because it expressly excluded nominations for the office of Supreme Court Justice from primary elections, *see* N.Y. Election Law § 6-106, the Legislature rejected the idea that the default would be to hold primaries for this particular office.

Nor is it of any moment that New York uses direct primaries to nominate candidates for judicial office for courts of limited jurisdiction (where those offices are elected rather than appointed). These courts are, by definition, limited in jurisdiction geographically and by subject matter. Rank-and-file voters are more likely to know the candidates for their local courts. And, due to their limited subject matter jurisdiction, judges of these local courts are less likely to address issues of broad impact. These considerations may mitigate the concerns about fundraising and diversity that counsel in favor of using conventions to nominate Supreme Court Justices.

Selection of trial court judges remains a matter of substantial public debate in New York, as indicated by the number and variety of *amici* in this case. That debate has resulted in many studies and proposals with respect to how the State of New York should select its jurists.[7] In view of this ongoing debate, and as the political body accountable to the citizens of New York, the Legislature will continue — as it has throughout history — to consider and debate the issues raised by this case. And should this Court conclude that the current statutory framework fails to comport with the federal Constitution, the Legislature should be given the opportunity to engage in this debate and devise a workable solution to any problems the Court identifies with respect to its nominating process.

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7. *See, e.g.*, Feerick Commission Report; Judith S. Kaye, *The State of the Judiciary 2006* (Feb. 6, 2006), *available at* http://nycourts.gov/admin/stateofjudiciary/soj2006.pdf; Judicial Selection Task Force, Ass'n of the Bar of the City of N.Y., *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (Oct. 2003), *available at* http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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